In The

Supreme Court of the United States

October Term, 1971

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KOMATZ CONSTRUCTION, INC.,

Petitioner,

vs.

WESTERN UNION TELEGRAPH COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

This petition for certiorari is to seek review of a decision of the Minnesota Supreme Court rendered on April 16, 1971, which affirmed the decision of the trial court limiting the damages of appellant to $500.00. A petition for rehearing was filed and denied, without opinion, on May 7, 1971. The Minnesota Court based its decision on an interpretation of the Federal Communications Act of 1934, 47 U.S.C.A., Sec. 151, et seq., which provisions and interpretations confer jurisdiction on this Court. The opinion, not yet reported, is reprinted in its entirety in the appendix.

QUESTION PRESENTED

Do the limitations of liability for an unrepeated message, when properly filed with the Federal Communications Commission, absolutely and under any or all circumstances preclude a recovery for an amount in excess of the limitations?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statutes involved are Sections 201, 202 and 203 of the Communications Act of 1934, the pertinent provisions being as follows:

(1) Sec. 201 — 47 U.S.C.A., page 88:

> (b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: PROVIDED, that communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications; PROVIDED, FURTHER, that nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest; PROVIDED, FURTHER, that nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter. June 19, 1934, c. 652, Title II, Sec. 201, 48 Stat. 1070; May 31, 1938, c. 296, 52 Stat. 588.

(2) Sec. 202 — 48 Stat. 1070, as amended by 74 Stat. 888, 47 U.S.C.A., Sec. 202:

> (a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in

charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services, whenever referred to in this chapter include charges for, or services in connection with, the use of common carrier lines of communications, whether derived from wire or radio facilities * * * or incidental to radio communication of any kind.

(3) Sec. 203(c), 48 Stat. 1071, 47 U.S.C.A., Sec. 203(3):

And no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

STATEMENT OF FACTS

On June 20, 1967, at 9:14 a.m., appellant sent a telegram from St. Peter, Minnesota, to Baudette, Minnesota. The telegram addressed to the Village Clerk of Baudette was sent by appellant to increase its bid on a construction contract letting that was scheduled by the Village for 2:00 p.m. on that same day. The effect of the contents of the telegram was to increase appellant's bid by some $80,000.00. The telegram was not delivered until after the bids had been opened, and appellant, as low bidder, was awarded the contract. If the telegram had been delivered prior to 2:00 p.m., appellant's

telegram would have increased its bid so that it would not have been the lowest bidder and would not have been awarded the contract. It is admitted the damages to appellant are far in excess of the $500.00 limitation.

The message was not written on a Western Union blank but was typed on a letterhead of appellant by one of its employees and handed to Norman Schmidt, an employee of the Nicollet Hotel, agent of respondent, who transmitted the message. The employee of appellant informed Mr. Schmidt of the importance of the message, and that it must be in Baudette by 2:00 p.m. of that same day. Mr. Schmidt was not aware of the route it would take to get to Baudette. Mr. Schmidt was also not aware that plaintiff could have insured his message by sending what is called a valued message. Neither Mr. Schmidt nor appellant was aware of any limitations of liability that respondent contends applies to all non-valued messages. No request was made for either a repeated message or valued message, and the message was transmitted at the unrepeated message rate.

The message was transmitted from St. Peter, Minnesota, at 9:14 a.m., to Mankato, Minnesota, then transmitted to Minneapolis, Minnesota, then transmitted from Minneapolis to Detroit, Michigan, then from Detroit to Toronto, Ontario, Canada, then from Toronto to Winnipeg, Canada, then, from Winnipeg to Fort Francis, Ontario, Canada, and finally from Fort Francis to Baudette, Minnesota. The respondent maintains no telegraph circuits from a Minnesota point to Baudette. All telegrams to Baudette are sent through Canada. The Village Clerk of Baudette received telephone notice of the telegram at 3:50 p.m., daylight saving time, and picked up the telegram from the Baudette receiving agent at 4:00 p.m., daylight saving time.

The respondent had filed its tariffs with the Federal Com-

munication Commission in accordance with the laws of the United States and the rules and regulations of the Commission. A part of these tariffs included certain limitation of liability on the part of the defendant as set forth on the back of any standard message form. Said language, as it pertains to this case, reads as follows:

ALL MESSAGES TAKEN BY THIS COMPANY ARE SUBJECT TO THE FOLLOWING TERMS:

To guard against mistakes or delays, the sender of a message should order it repeated, that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeated message rate is charged in addition. Unless otherwise indicated on its face, this is an unrepeated message and paid for as such, in consideration whereof it is agreed between the sender of the message and the Telegraph Company as follows:

1. The Telegraph Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any message received for transmission at the unrepeated message rate beyond the sum of five hundred dollars; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any messages received for transmission at the repeated message rate beyond the sum of five thousand dollars, unless specially valued; nor in any case for delays arising from unavoidable interruption in the working of its lines.

2. In any event the Telegraph Company shall not be liable for damages for mistakes or delays in the transmission or delivery, or for the non-delivery of any message, whether caused by the negligence of its servants or otherwise, beyond the actual loss, not exceeding in any event the sum of five thousand dollars, at which amount the sender of each message represents that the message is valued, unless a greater value is stated in writing by the sender thereof at the time the message is tendered for transmission, and unless the repeated-message rate is paid or agreed to be paid and an additional charge equal to one-tenth of one per cent of the amount by which such valuation shall exceed five thousand dollars.

3. The Telegraph Company is hereby made the agent of the sender, without liability, to forward this message over the lines of any other company when necessary to reach its destination.

Respondent made a motion for summary judgment to limit the appellant as a matter of law, to a maximum recovery of $500.00 on the grounds the limitations became a part of the tariffs and by virtue of the applicable provisions of the Federal Communications Act of 1934 the appellant regardless of the circumstances, conditions or route under which the message was sent, was absolutely precluded from recovering in excess of the $500.00 limitation for an unrepeated message. The motion was granted by the trial court, the District Court for the Fifth Judicial District, State of Minnesota, and pursuant to the order, judgment was entered on February 6, 1970. The Minnesota Supreme Court affirmed the judgment of the trial court.

ARGUMENT

The Minnesota Supreme Court in its descision made an interpretation of prior decisions of this Court which is not in accord therewith, and the effect of which was to decide a federal question of substance not heretofore determined by this Court.

The Minnesota Court fundamentally based its decision on two prior decisions of this Court, they being *Western Union Telegraph Co. v. Esteve Bros. & Co.* (1921), 256 U.S. 584, 41 S.Ct. 584, and *Western Union Telegraph Co. v. Priester* (1928), 276 U.S. 252, 48 S.Ct. 234. The effect of their decision would be far reaching because it would absolutely free the respondent from any liability for delay in transmission of an unrepeated message regardless of the circumstances. Was this the import of these decisions, and the intent of Congress in our current society? We submit it was not.

Nowhere in either the Communications Act of 1910 or 1934 does Congress state the limitations of liability are a part of the rate. It is a Court rule of interpretation first laid down by this Court in 1894 by *Primose v. Western Union Telegraph Company*, 154 U.S. 1, 14 Sup. Ct. Rep. 1098, and enlarged in the *Estere* and *Priester* cases. We submit the rule is not as conclusive as the lower court directs, or if it is, that it is outdated and should be changed. Other carriers who are engaged in interstate commerce, such as airlines and railroads, are not afforded the same immunities. If the principle of spreading the loss among many, rather than have one person shoulder a severe loss, is sound and established practice for other common carriers, it should likewise be sound for Respondent. All industries, at one time or another, have proclaimed that to make them subject to damages would destroy them. And yet, in spite of the Court's ruling otherwise, we have the strongest industrial nation in the world. The immunity of the Federal, State and various local political subdivisions have all been virtually eliminated within the last twenty years, and it would be a strange anomaly to make an exception for the Respondent. Furthermore, it would seem that all other common carriers could become immune by filing limitations of liability as a part of their rates. The gross injustice would be multiplied.

It would also be extremely unreasonable and unfair to apply the limitations on an unrepeated message because an unrepeated message guards against mistakes, but not delays. Furthermore, the Petitioner could not value the message to send a valued message as, under the circumstances, it would be impossible to value. This Court in *Western Union Telegraph Company v. Czizek* (1924), 264 U.S. 281, 44 S.Ct. 328, decided after the *Estere* case, *supra*, based its decision on the valuation point and implied it would hold otherwise on an unrepeated message.

The Court also held that Respondent cannot be estopped from asserting the limitations on the basis it violates the requirement of uniformity and equality. But it is also not uniform and is discriminatory to have Petitioner assume the risk of loss when the Respondent did not provide a method or rate that afforded Petitioner an opportunity to protect itself. This Court has not ruled on the issue of whether estoppel can be used to prevent the harshness of the limitations of liability. It is a doctrine favored by the courts and is often used by the courts to give elasticity to an otherwise rigid rule so that justice can prevail. Minnesota, in the case of *Diamond v. Manheim* (1895), 61 Minn. 178, 63 N.W. 495, has declared the doctrine of equitable estoppel to be a favored doctrine in the following language:

> "The equitable doctrine of estoppel by conduct, which is altogether different from technical legal estoppels in pais, so far from being odious, is a favored doctrine of the courts. Equitable estoppel, in the modern sense, arises from the 'conduct' of a party using that word in its broadest meaning, as including his spoken or written words, his positive acts, and his silence or negative omission to do anything. Its foundation is justice and good conscience; its object is to prevent the unconscientious and inequitable assertion or enforcement of claims or rights which might have existed or been enforceable by other rules of law, unless prevented by the estoppel; and its practical effect is, from motives of equity and fair dealing, to create and vest opposing rights in the party who obtains the benefit of the estoppel."

As this Court has not ruled on the application of estoppel, we submit it was error for the lower court to hold it did not apply because such holding is contra to the Rules of Decision Act and the interpretation of such act declared in *Erie R. Co. v. Tompkins* (1938), 304 U.S. 64, 58 S.Ct. 817. The doctrine of estoppel is a matter of substantive law and

also, in a sense, a matter of public policy in the free application of its doctrine by a state, and *Erie R. Co. v. Tompkins, supra*, requires the adherence to state decision law in both instances.

It seems perverse to justice that Respondent should also be immune from the application of this ancient, tested, and accepted doctrine of fundamental law. To so hold, would be to condone and encourage the indifferent and outmoded services the public has had to accept in the last twenty years from Respondent. The record in this case shows Respondent didn't even acquaint their own agent with the various rates or methods of transmission, let alone inform the public of the chances they take when using the service. It is a classic case of equitable estoppel.

We have kept the argument brief and avoided repetition, but we invite the Court to peruse Petitioner's Brief submitted to the lower court which is on file for a more extended argument on the issue.

Fundamentally, if the decisions of this Court made in the 1920s do validate the limitations of liability, then this Court should reverse, because the law and our society has dramatically changed in fifty years, and what may have been good law in 1920 is not good in 1970. It is also completely opposite to all of the changed body of law striking down the immunity doctrine.

WHEREFORE, the Petitioner prays that a writ of certiorari be issued to review the judgment of the Minnesota Supreme Court in this action.

Respectfully submitted,

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APPENDIX

No. 272 Nicollet County Kelly, J.

Komatz Construction, Inc.,

Appellant,

42433 vs.

Western Union Telegraph Company,

Respondent.

SYLLABUS

1. A telegraphic message transmitted from one point to another, both located in this state, but routed through another state and Canada, is interstate commerce and is governed by Federal statutes and Federal common law to the exclusion of conflicting state law.

2. The limitation of liability for mistakes, delays in transmission, or for nondelivery of an unrepeated interstate message, contained in telegraph company's tariff filed with the Federal Communications Commission, is binding on the sender of such a message even though (a) the limitations are not expressed on the blank or form used by the sender, who used his own letterhead; (b) the sender had no knowledge of the existence of such limitations; (c) the sender suffered substantial damage because of a delay in transmission which may or may not have been avoided by a repeated message; (d) the routing of the message is assumed to have been unreasonable and to have contributed to the delay.

3. The doctrine of estoppel may not be availed of to avoid the limitation of liability contained in a telegraph company's

tariff in a cause of action for damages resulting from delay in transmission of an unrepeated message for the reasons that its application would result in (a) the claimant receiving a preference or advantage contrary to § 202(a) of the Communications Act of 1934, 48 Stat. 1070, 47 U.S.C.A., § 202(a) and (b), a violation of the requirement of uniformity and equality of rates in § 203(c) of the act, 48 Stat. 1071, 47 U.S.C.A., § 203(c).

4. The provision in § 206 of the Communications Act of 1934, 48 Stat. 1072, 47 U.S.C.A. § 206, that a common carrier shall be liable for the full amount of damages sustained as a consequence of any violation of the act does not apply to a cause of action based on a delay in the transmission of an interstate message as such a delay does not constitute a violation of the act.

Affirmed.

Heard before Knutson, C.J., and Rogosheske, Kelly, Frank T. Gallagher, and Rosengren, J.J.

Reconsidered and decided on the record by the court en banc.

OPINION

KELLY, Justice.

This is an appeal from summary judgment limiting to $500 the amount of damages sustained by plaintiff as a result of defendant's delay in transmitting a message.

At 9:14 a.m., plaintiff's employee sent a telegram from St. Peter, Minnesota, to Bandette, Minnesota, using defendant's facilities. The message was not written on a Western Union blank but was typed on a letter head of plaintiff. Plaintiff's employee informed defendant's agent that the message must be in Bandette by 2 p.m. of that same day.

The telegram was transmitted from St. Peter to the following cities: Mankato; Minneapolis; Detroit, Michigan; Toronto, Ontario; Winnepig, Manitoba; Fort Francis, Ontario; and finally to Baudette. Defendant maintained no telegraph circuits from a Minnesota point to Baudette and sent such telegrams through Canada. Thus, the customary route was used for the message involved here. The telegram was picked up at 4 p.m. on that same day. Due to the delay, plaintiff admittedly suffered more than $500 in damages.

The defendant had filed its tariff with the Federal Communications Commission in accordance with the laws of the United States and the rules and regulations of the commission. The tariff includes limitations of liability as set forth on the back of defendant's standard message form, the relevant portion of which provides:

"ALL MESSAGES TAKEN BY THIS COMPANY ARE SUBJECT TO THE FOLLOWING TERMS:

"To guard against mistakes or delays, the sender of a message should order it repeated, that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeated message rate is charged in addition. Unless otherwise indicated on its face, this is an unrepeated message and paid for as such, in consideration whereof it is agreed between the sender of the message and the Telegraph Company as follows:

"1. The Telegraph Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any message received for transmission at the un-repeated message rate beyond the sum of five hundred dollars; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any message received for transmission at the repeated-message rate beyond the sum of five thousand dollars unless specially valued; nor in any case for delays arising from unavoidable interruption in the working of its lines.

"2. In any event the Telegraph Company shall not be liable for damages for mistakes or delays in the transmission or delivery, or for the non-delivery, of any message, whether caused by the negligence of its servants or otherwise, beyond the actual loss, not exceeding in any event the sum of five thousand dollars, at which amount the sender of each message represents that the message is valued, unless a greater value is stated in writing by the sender thereof at the time the message is tendered for transmission, and unless the repeated-message rate is paid or agreed to be paid and an additional charge equal to one-tenth of one per cent of the amount by which such valuation shall exceed five thousand dollars."

Neither plaintiff nor its employee was aware of any limitations of liability. No request was made for a valued message or repeated message and as a result the telegram was transmitted at the unrepeated message rate.

Plaintiff instituted this action against defendant for damages incurred because the telegram was delayed. Defendant made a motion for summary judgment to limit plaintiff, as a matter of law, to a maximum recovery of $500. The trial court granted the motion and judgment was entered limiting the liability of defendant to a maximum of $500.

The issue on appeal is whether the limitation of liability for mistakes or delay in the transmission of an unrepeated interstate message in the tariff filed by defendant applies to plaintiff's cause of action and limits the recovery to $500.

The message in this case was sent from one point to another, both locations in Minnesota. However, it was routed through another state and a foreign country and is therefore interstate commerce under the holding of Western Union Telegraph Co. v. Speight, 254 U.S. 17, 41 S.Ct. 11, 65 L.ed. 104 (1920).

Plaintiff contends that the law of Minnesota, not Federal law, governs in the instant case and cites Minn. St. 237.44[1] and Dettis v. Western Union Telegraph Co., 141 Minn. 361, 170 N.W. 334 (1919). At the time Dettis was decided, there were no United States Supreme Court decisions clearly indicating that the Federal government had preempted the field of law governing the liability of telegraph companies for delays, errors, omissions and nondelivery of interstate messages. This court understandably applied state law, citing an Interstate Commerce Commission ruling that telegraph companies were not required to file tariffs for interstate messages and concluding that, inasmuch as such filings were voluntary, no notice of limitations of liability contained in the tariffs was to be imputed to the sender of an interstate message.[2] However, in Siats v. Western Union Telegraph Co., 251 Minn. 412, 88 N.W.(2d) 199 (1958), this court acknowledged that the Federal government had indeed preempted this field of law in these words:

> "* * * [I]t should be observed that on June 18, 1910, Congress amended the Interstate Commerce Act, 36 Stat.

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[1]Minn. St. 237.44 provides as follows: "If any person or corporation owning or operating a telegraph line wholly or partly within the state shall fail to transmit any message within a reasonable time, or to exercise due diligence to that end, after its reception, or shall fail to deliver any message to the party to whom it is addressed within a reasonable time after its arrival at the place of destination, he or it shall be liable in a civil action at the suit of the party injured for all damages sustained by reason of such neglect or omission. The company delivering the message shall state plainly thereon the exact time when it was received at the original point for transmission."

[2]In Lind v. Western Union Telegraph Co., 173 Minn. 424, 217 N.W. 486 (1928), the court recognized the validity of limitations of liability contained in tariffs filed by telegraph companies with the Interstate Commerce Commission as to all persons sending foreign or interstate messages over their lines, but did not apply the limitation because the company was unable to prove that the limitations were contained in any tariff filed by it with the commission.

> 539, 545, so as to place interstate telegraphic communication under the jurisdiction of the Interstate Commerce Commission. Such jurisdiction was transferred to the Federal Communications Commission with the enactment of the Communications Act of 1934, 47 U.S.C.A., § 151, et seq. Ever since Federal control was thus established, telegraph companies, as to interstate transactions, have been subject to a national and uniform rule of law. Notwithstanding Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.ed. 1188, interstate message transactions are still governed by Federal law to the exclusion of conflicting state law; and this means that they are governed not merely by the provisions of Federal statutes but by 'Federal common law' as well." 231 Minn. 414, 88 N.W.(2d) 202.

The following provisions of the Communications Act of 1934 are the foundation for the proposition that the limitations of liability contained in a telegraph company's tariff for interstate messages on file with the Federal Communications Commission are controlling as a matter of law with respect to the amount plaintiff may recover, the theory being that if damages were to be paid in excess thereof that the claimant would be given a "preference or advantage," and the company would be receiving "less or different compensation for such communication * * * than the charges specified in the schedule then in effect."

Section 202, 48 Stat. 1070, as amended by 74 Stat. 888, 47 U.S.C.A., § 202, provides in part:

> "(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, *or to make or give any undue or unreasonable preference or advantage to any particular person*, class of persons or locality, or to subject any particular person,

class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

"(b) Charges or services, whenever referred to in this chapter include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities * * * or incidental to radio communication of any kind." (Italics supplied.)

Section 203(c), 48 Stat. 1071, 47 U.S.C.A., § 203(c), provides in part with regard to tariffs filed with the Federal Communications Commission:

"* * * [A]nd no carrier shall (1) *charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect*, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule." (Italics supplied.)

The limitation of liability for an unrepeated message became effective when defendant's tariff was filed under the above sections, and defendant by law must adhere to this limitation. In Western Union Telegraph Co. v. Esteve Brothers & Co., 256 U.S. 566, 41 S.Ct. 584, 65 L.ed. 1094 (1921), the court held that recovery against Western Union for an error in an unrepeated cable message resulting in a substantial loss to Esteve Brothers was limited to the toll charges for the cable by Western Union as provided in the tariff then on file with the Interstate Commerce Commission. In Esteve the limitations of liability were not expressed on the blank used nor did the sender know of their adoption or filing. The court in Esteve stated:

"The lawful rate having been established, the company was by the provisions of § 3 of the Act to Regulate Commerce prohibited from granting to anyone an undue preference or advantage over the public generally. For, as stated in Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co., supra, 30, the 'Act of 1910 was designed to and did subject such companies as to their interstate business to the rule of equality and uniformity of rates.' If the general public upon paying the rate for an unrepeated message accepted substantially the risk of error involved in transmitting the message, the company could not, without granting an undue preference or advantage extend different treatment to the plaintiffs here. The limitation of liability was an inherent part of the rate. The company could no more depart from if than it could depart from the amount charged for the service rendered.

"The Act of 1910 introduced a new principle into the legal relations of the telegraph companies with their patrons which dominated and modified the principles previously governing them. Before the act the companies had a common-law liability from which they might or might not extricate themselves according to views of policy prevailing in the several States. Thereafter, for all messages sent in interstate or foreign commerce, the outstanding consideration became that of uniformity and equality of rates. Uniformity demanded that the rate represent the whole duty and the whole liability of the company. It could not be varied by agreement; still less could it be varied by lack of agreement. The rate became, not as before a matter of contract by which a legal liability could be modified, but a matter of law by which a uniform liability was imposed. Assent to the terms of the rate was rendered immaterial, because when the rate is used, dissent is without effect." 256 U.S. 571, 41 S.Ct. 586, 65 L.ed. 1097.

The fact that the message was not on a Western Union form containing the limitations of liability is a matter of no consequence. Under the fundamentals of Esteve, the senders of interstate messages are bound as a matter of law by the

limitations of liability without regard to their assent because the messages are sent at a lawfully established rate which could not be departed from without creating an undue preference or advantage in violation of the statutes.

Plaintiff contends that the limitations of liability should not apply to delays in interstate messages by assuming a repeated message would not guard against delay, only mistakes. If we accept this assumption as being correct, it is of no help to plaintiff's claim.[3] First of all, the tariff on file specifically limits liability for each type of message used and covers specifically delays, mistakes, and nondelivery. The United States Supreme Court reviewed the liability of telegraph companies in Western Union Telegraph Co. v. Czizek, 264 U.S. 281, 44 S.Ct. 328, 68 L.ed. 682 (1924). In Czizek, the "telegram was an unrepeated message of the class known as a night letter and was not specially valued or paid for upon a value in excess of $50." 264 U.S. 283, 44 S.Ct. 329, 68 L.ed. 684. The tariff of Western Union then on file and approved by the Interstate Commerce Commission included the form used in that case, which provided:

> "* * * The Company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of any UNREPEATED telegram, beyond the amount received for sending the same. * * * 2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the nondelivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of FIFTY DOLLARS, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an addition-

[3] We do not concede it is correct, but if correct, it would be of no consequence. See, Nolte Brass Foundry Co. v. Western Union Telegraph Co. (S.D. Ohio), 38 F.(2d) 838 (1930).

> al sum paid or agreed to be paid based on such value equal to one-tenth of one per cent, thereof." 264 U.S. 283, 44 S.Ct. 328, 68 L.ed. 684.

The court held that the second provision applied although the message was never transmitted due to the inadvertence of a receiving clerk followed by subsequent mistaken assurances that it had been sent.[4] If we should assume that a repeated message could not guard against delays, we most certainly should assume that such a message would not guard against nondelivery.

If, as held in Czizek, the limitations of liability are to apply to nondelivery, it would strain all logic and reasoning to say that the same should not apply to a delay in delivery.

Plaintiff also contends that the route used for the message was unreasonable, and that under Western Union Telegraph Co. v. Speight, *supra*, the route of the message must be reasonable, quoting the following language from that case:

> "If the mode of transmission adopted had been unreasonable as against the plaintiff, a different question would arise, but in that case the liability, if it existed,

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[4]The court in Czizek explained its choice of the second provision by this somewhat cryptic statement: "We have not adverted to the first clause of the exemptions, limiting liability to the amount received for sending the message. Obviously this has a narrower scope than the valuation clause and we should hesitate to hold that it exonerated the defendant in this case. Unrepeated Message Case, 61 I.C.C. 541." 264 U.S. 285, 44 S.Ct. 329, 68 L.ed. 685. This unrepeated message case was decided in 1921 after the cause of action in Czizek arose but before the opinion thereon was rendered.

Plaintiff contends that this language supports the proposition that the limitations of liability do not apply to delays in transmission when a repetition of the message would not have prevented the loss. However, Czizek has not inhibited the courts generally from holding that the limitations of liability do apply to cases involving defaults which repetition would not have prevented. Western Union Telegraph Co. v. Abbott Supply Co., 45 Del. 345, 74 A.(2d) 77, 20 A.L.R.(2d) 754, § 10, p. 778 (1950). The court in Abbott attempts to explain the above quotation from Czizek.

> would not be a liability for an intrastate transaction that never took place but for the unwarranted conduct and the resulting loss." 254 U.S. 19, 41 S.Ct. 11; 65 L. ed. 105.

This quoted language results in a circular argument. Assuming the routing in the instant case was unreasonable and that "the liability, if it existed, would not be a liability for an intrastate transaction that never took place," plaintiff here would have no relief under state law. If the liability was for the "unwarranted conduct and resulting loss" under Federal law, it has to be admitted that the result of the unwarranted conduct was a delay in transmission for which liability is specifically limited in defendant's tariff to $500 for unrepeated messages. This limitation of liability is the lawful condition upon which an unrepeated message may be sent under defendant's filed tariff. Western Union Telegraph Co. v. Priester, 276 U.S. 252, 48 S.Ct. 234, 72 L.ed. 555 (1928). Whatever the meaning of the language quoted from Speight, it cannot now be a persuasive argument for the plaintiff's cause in the light of the following from Priester:

> "* * * By § 1 of the Interstate Commerce Act it is provided that subject to the approval of the Commission messages received by telegraph companies for transmission may be classified into 'repeated, unrepeated . . . and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages.' The established rates for unrepeated messages thus became the lawful rates and the attendant limitation of liability became the lawful condition upon which messages might be sent. * * * What had previously been a matter of common law liability, with such contractual restrictions as the states might permit, then became the subject of federal legislation to secure reasonable and just rates for all without undue preference or advantage to any. Since that end is attainable only by adherence to the approved rate, based upon

> an authorized classification, that rate 'represents the whole duty and the whole liability of the company.' * * * Such being the basis of liability, we do not perceive any adequate ground upon which it may be enlarged merely by the application of a 'vituperative epithet' to the admitted fault of the petitioner. * * * For if it be assumed that we can weigh and measure degrees of negligence and that a public service company may not by contract alone limit its liability for gross negligence, so-called, nevertheless we may not disregard a lawful exercise of the regulatory power which has made no distinction between degrees of negligence, nor may we, upon any theory of public policy, annex to the rate as made conditions affecting its uniformity and equality." (Citations omitted.) 276 U.S. 259, 48 S.Ct. ..., 72 L. ed. 565.

Even if it were gross negligence for the defendant to choose such a route, the plaintiff could not recover since one of the fundamentals of Priester is that the limitations of liability in an appropriate case apply even where gross negligence by the telegraph company is proved. Assuming, without deciding, that the routing in the instant case was unreasonable and contributed to the delay, the plaintiff is nonetheless bound by the limitation of liability, for we may not upon any theory of public policy annex to the message rates conditions affecting their uniformity and equality.

Plaintiff claims that the defendant, because of certain actions and omissions on its part and on the part of its agent, is estopped from asserting the limitations of liability of its filed tariff. It was held in Postal Telegraph-Cable Co. v. Howe, 46 Nev. 239, 211 P. 358 (1923), that estoppel cannot be asserted to prevent telegraph companies from relying on the limitations of liability for the reason that this would upset the uniformity and equality of treatment demanded by the Federal law. Also, in Western Union Telegraph Co. v. Woods (Tex. Civ. App.), 266 S.W. 179 (1924), it was held

that a telegraph company could not waive the conditions contained in the limitations of liability it had filed with the Interstate Commerce Commission and that estoppel would be unavailing.

It appears to this court that not only would the application of an estoppel violate the requirement of uniformity and equality of rates, but it would result in the giving of a preference or advantage. §§ 202(a), 203(c) of the Communications Act of 1934, 48 Stat. 1070, 1071, 47 U.S.C.A., §§ 202(a), 203(c).

The plaintiff also asserts that §§ 206 and 207 of the Communications Act of 1934, 48 Stat. 1072, 1073, 47 U.S.C.A., §§ 206 and 207, create a cause of action in excess of tariff limitations. Section 206 reads as follows:

> "In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

Section 207 reads as follows:

> "Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies."

The arguments advanced by plaintiff as to the effect of §§ 206 and 207 were also presented in Stanely v. Western Union Telegraph Co. (S.D. Fla.), 23 F. Supp. 674 (1938). The court there held that a claim for damages for nondelivery of a message was not a claim for "violation of the statute."

In Ivy Broadcasting Co. v. American T. & T. Co. (2 Cir. 1968), 391 F.(2d) 486, plaintiff claimed negligence and breach of contract against defendant company. The court's opinion clearly indicates that §§ 206 and 207 of the Communications Act of 1934 do not grant a remedy for negligence or breach of contract in the rendition of communication services and that recovery under these sections may be had only for specific violations of the act.[5]

The damages claimed in the instant case were not caused by a violation of the Communications Act of 1934 and consequently these sections have no application to this case.

Plaintiff asserted in oral argument before this court that the limitations of liability in defendant's tariff should not apply on the ground that defendant had not complied with requirements for posting under § 203(a) of the act, 48 Stat. 1070, 47 U.S.C.A., § 203(a) and the administrative rulings thereunder contained in 47 C.F.R. 61 to 72. This issue was

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[5]The language of §§ 206 and 207 of the Federal Communication Act is substantially the same as that of §§ 8 and 9 of the Interstate Commerce Act, 24 Stat. 384 and 382, as amended, 49 USCA, §§ 8 and 9; thus decisions interpreting §§ 8 and 9 of the latter act are helpful in determining the correct application of the very similar provisions involved in this case. It has been held that §§ 8 and 9 of the Interstate Commerce Act apply only to direct violations of the act and not to injury to goods in transit, Olcovich v. Grand Trunk Railway Co., 20 Cal. App. 349, 129 P. 290 (1912); or for the loss of goods, Atlantic Coastline R. Co. v. Riverside Mills, 219 U.S. 186, 31 S.Ct. 164, 55 L. ed. 167, 31 L.R.A. (N.S.) 7 (1911); or damages caused by failure to deliver goods, Galveston, Harrisburg & San Antonio Ry. Co. v. Wallace, 223 U.S. 481, 32 S.Ct. 205, 56 L. ed. 516 (1912).

not raised by the pleadings or litigated by the court below and is therefore not subject to review. Schlecht v. Schlecht, 168 Minn. 168, 209 N.W. 883 (1926).

Affirmed.

(Endorsed. Filed April 16, 1971. John McCarthy, Clerk, Minnesota Supreme Court.)

STATE OF MINNESOTA
OFFICE OF CLERK OF SUPREME COURT
St. Paul, Minn.

April 21, 1971

Komatz Construction, Inc.,

Appellant,

vs. 42433

Western Union Telegraph Company,

Respondent.

PETITION FOR REARGUMENT FILED

SIR:

You will please take notice that on this date the following order was entered in the above entitled cause:

Application for reargument having been filed herein all further proceedings, except taxation of costs are stayed pending its determination.

Yours respectfully,

MAE SHERMAN,
Clerk Supreme Court

(Title of Cause.)

ORDER

This cause came duly on for hearing before the undersigned in the District Court Chambers, Nicollet County Courthouse, St. Peter, Minnesota, commencing at 2:00 p.m., October 7, 1968. Willis Gustafson of the Firm of Gault, MacKenzie & Gustafson, St. Peter, Minnesota, appeared on behalf of plaintiff; Arthur Ogle of the Firm of Blethen, Ogle, Gage & Krause, Mankato, Minnesota, appeared on behalf of defendant.

Pre-trial conference proceedings were held in a preliminary way and the Court has also tentatively considered a motion for summary judgment heard by agreement of the parties, made upon grounds and in form more particularly set forth in the original motion papers on file with the Clerk of this Court to which reference is hereby made and the same incorporated herein as if set forth at length.

It appears this action is predicated upon plaintiff's claim it suffered loss by reason of unreasonable and negligent delay on the part of defendant telegraph company in the transmission of a telegram dispatched from St. Peter, Minnesota, to an addressee at Baudette, Minnesota, on or about June 20, 1967, and defendant's failure at the time of delivery of the message to disclose to plaintiff that transmission routing would necessarily have to go outside the State of Minnesota and through facilities situated in Canada to effect delivery. As a result of the delay it is plaintiff's claim that a mistaken bid for work to be let on contract at Baudette was accepted as a low bid whereby plaintiff sustained loss. The defendant asserts that Federal law and the tariff schedules pursuant to that law control the obligations of defendant and limit its liability in any event toward plaintiff. There

are disputed issues of negligence, notice, the facts surrounding the reception and transmission of the message and other matters which are not relevant at this point. The defendant's motion for summary judgment fairly raises the question whether by reason of the posting of its tariff and accompanying limitation on liability to $500.00 as to messages of the type involved in this action the plaintiff's claims cannot, in any event, exceed $500.00 as a matter of overriding Federal law.

It appears to the Court that a threshold determination as to whether defendant's contention is correct must logically be made before other issues raised by the pleadings and the contentions of the parties are dealt with. I am, therefore, treating the matter as one tentatively for disposition on summary judgment and am affording the parties opportunity to file briefs as they may be advised. Defendant is afforded two weeks in which to file its memorandum of authority on the motion; from and after service upon plaintiff of defendant's brief, plaintiff will have a like period in which to respond.

Dated the 7th day of October, 1968.

/s/ NOAH S. ROSENBLOOM
Judge of District Court

(Title of Cause.)

ORDER

This cause came duly on for hearing before the undersigned in the District Court Chambers, Nicollet County Courthouse, St. Peter, Minnesota, for pre-trial conference. The proceedings then held resulted in a pre-trial order with purpose and effect apparent by reference to the original thereof on file with the Clerk of this Court.

Counsel have since briefed the question whether plaintiff's right of recovery is limited, in any event, to $500.00. This Court has considered that question as if defendant had made a motion for summary relief to determine it.

Upon all the files, records and proceedings herein, and the Court having considered the briefs filed by counsel together with a responsive letter in reply from plaintiff. Upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED THAT:

The motion for summary relief be:

(1) Granted as to plaintiff's claims for damages for alleged unreasonable delay in transmission; and,

(2) Denied as to plaintiff's claims predicated upon defendant's negligence in the reception of plaintiff's message for transmission.

Dated the 14th day of June, 1969.

/s/ NOAH S. ROSENBLOOM
Judge of District Court

MEMORANDUM

It seems settled federal law that limitations of liability incorporated in a tariff duly filed under the applicable federal regulatory statutes are binding on persons who send, receive and transmit telegraph messages of the type here involved.

Plaintiff appears to bottom claims on negligence of the defendant by its agent at St. Peter at the time the message was offered for transmission. If plaintiff sustains its claims, that negligence may not be within the language of the tariff which deals with "mistakes or delays in the transmission or delivery, or for non delivery," of messages (although the result might very well be a delay in transmission, or delivery, or a non delivery situation).

I am satisfied the *Siats* case (88 N.W.(2d) 199) impliedly overrules the *Dettis* case. *Siats* clearly holds that federal law controls. Insofar as federal law does not restrict the limitation in the tariff to errors or omissions which a repeated message might have avoided, *Dettis* is overruled. But *Siats* impliedly permitted recovery in excess of the $500.00 limitation urged by defendant here. I cannot determine the basis upon which that result was reached but assume Western Union capably defended it's position there, as here. Therefore, though federal law does control, *Siats* stands for the implied proposition that the $500.00 limitation does not apply in every situation arising out of negligent handling of an unrepeated message by the telegraph company. At the trial or in further pre-trial proceedings counsel may develop more precisely the negligent acts on which plaintiff founds his claim and further authority not so far brought to my attention. Should it then be clear that summary relief is appropriate the Court can take another look.

Dated the 14th day of June, 1969.

/s/ NOAH S. ROSENBLOOM
Judge of District Court

(Title of Cause.)

ORDER

This cause came duly on before the undersigned in Chambers, Nicollet County Courthouse, St. Peter, Minnesota, at 2:15 p.m., October 8th, 1969. Blethen, Ogle, Gage & Krause appeared by Arthur Ogle on behalf of Defendant; Gault, MacKenzie & Gustafson appeared by W. M. Gustafson on behalf of Plaintiff.

Defendant renewed the motion treated by this Court's order of June 14th, 1969, seeking summary judgment that its liability is limited, in any event, to $500.00.

Defendant filed a supplemental brief; the Court has read the testimony of Defendant's Agent, Norman Schmidt, on deposition. On all the files, records and proceedings herein,

IT IS HEREBY ORDERED THAT:

The motion be granted.

Dated the 13th day of October, 1969.

/s/ NOAH S. ROSENBLOOM
Judge of District Court

MEMORANDUM

Counsel's further discussion going into the background of the *Siats* case (88 N.W.(2d) 199) goes to eliminate the inference reflected in my decision of last June. *Postal Telegraph vs. Eubanks*, a Mississippi case cited by Defendant, is more to the point, though it is not binding on this Court. No Federal authority binding my decision has been cited covering this precise situation as to the liability of Western Union for the acts of its agent in soliciting and receiving message traffic. The deposition of agent Schmidt negatives liability based upon his negligence in the initial dealing with Plaintiff's agent or the possibility of an estoppel. This leaves only Defendant's conduct in transmitting the message and that, as I had already decided in June, is clearly within the Federal law and subject to the $500.00 limitation.

Dated the 13th day of October, 1969.

/s/ NOAH S. ROSENBLOOM
Judge of District Court

(Title of Cause.)

JUDGMENT

The above matter came before the Court on the motion of the Defendant for a summary judgment in favor of Defendant on any claims in excess of the sum of $500.00, said motion being on file herein. Said motion was originally heard before the Court at St. Peter, Minnesota on October 7, 1968, and on June 14, 1969, the Court entered its order in which said motion was granted in part and denied in part. The motion was renewed and an additional hearing was held before the Court at St. James, Minnesota on October 8, 1969,

and on October 15, 1969 the Court filed its order dated October 13, 1969 granting Defendant's motion in full.

NOW THEREFORE, based upon said orders and particularly upon the order dated October 13, 1969,

IT IS HEREBY ADJUDGED AND DECREED THAT, the claim of the Plaintiff insofar as it seeks relief and damages in excess of the sum of $500.00 is hereby dismissed on the merits and with prejudice, but without prejudice to the right of the Plaintiff to assert a claim against the Defendant for a maximum of $500.00 in damages.

Dated this 6th day of February, 1970.

OLIVE PETERSON
Clerk of the District Court
By /s/ ANNA MAE WIEST
Deputy

Supreme Court, U.S.
FILED
AUG 27 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 163 71-163

KOMATZ CONSTRUCTION, INC.,

Petitioner,

vs.

WESTERN UNION TELEGRAPH COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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